

SECTION 2. 327 IAC 17 IS ADDED TO READ AS FOLLOWS:

**ARTICLE 17. SURFACE WATER MODIFICATION PERMIT AND WATER QUALITY CERTIFICATION**

**Rule 1. General Provisions**

**327 IAC 17-1-1 Purpose**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

Sec. 1. (a) This article governs the issuance of water quality certifications by the department under section 401 of the Clean Water Act, 33 U.S.C. §1341 and the issuance of state surface water modification permits. This article establishes procedures and criteria for the review of applications for projects that would alter waters of the state through the placement of dredged or fill materials, excavation, or mechanical clearing of vegetation. This article sets forth the requirements to obtain either a state surface water modification permit or a state water quality certification required by section 401 of the federal Clean Water Act, 33 U.S.C. §1341 for the aforementioned activities.

(b) It is the purpose of this article, consistent with the Clean Water Act, to maintain the chemical, physical, and biological integrity of the waters of the state and achieve no overall net loss of the existing wetlands resource base with respect to wetlands acreage and existing and designated uses in the state. (*Water Pollution Control Board; 327 IAC 17-1-1*)

**327 IAC 17-1-2 Applicability of section 401 water quality certifications**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

Sec. 2. (a) Section 401(a)(1) of the Clean Water Act requires that an applicant for a federal license or permit to conduct any activity including the construction or operation of facilities, that may result in any discharge into navigable waters of the United States, shall obtain, from the state where the discharge does or will originate, a water quality certification that the discharge will comply with applicable provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act (33 U.S.C. §§1311, 1312, 1313, 1316, and 1317). Section 401(d) requires the water quality certification to set forth any requirements necessary to assure that the applicant will comply with the applicable provisions of the Clean Water Act and state law, including water quality standards.

(b) Federal permits or licenses to which this rule applies include the following:

(1) A permit from the U.S. Army Corps of Engineers issued pursuant to either of the

following:

(A) Section 10 of the River and Harbors Act (33 U.S.C. §41) .

(B) Section 404 of the Clean Water Act (33 U.S.C. §1344).

(2) A license issued by the Federal Energy Regulatory Commission.

(Water Pollution Control Board; 327 IAC 17-1-2)

**327 IAC 17-1-3 Applicability for state surface water modification permits**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 3. (a) A surface water modification permit is required for those activities that do not require a water quality certification under section 2 of this rule and involve placement of dredged or fill materials, excavation, or mechanical clearing of vegetation in waters of the state.**

**(b) A surface water modification permit is required for an activity that meets the requirements of subsection (a) and would have been required by the department to obtain a NPDES permit for the activity prior to the effective date of this rule.**

**(c) A surface water modification permit, if issued by the department, may serve as a water quality certification for the purposes of section 401 of the Clean Water Act, 33 U.S.C. §1341.**

(Water Pollution Control Board; 327 IAC 17-1-3)

**327 IAC 17-1-4 Definitions**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-2**

**Affected: IC 13-11-2-265**

**Sec. 4. In addition to the applicable definitions contained in IC 13-11-2, the following definitions apply throughout this rule:**

**(1) “Adjacent property owner” means an owner of land that is adjacent to the site of a proposed project that is the subject of a water quality certification application.**

**(2) “Administrator” means the administrator of the United States Environmental Protection Agency or an authorized representative, including the regional administrator for Region V.**

**(3) “Applicable provisions of federal and state law” means the provisions of sections 301, 302, 303, 306, and 307 of the Clean Water Act (33 U.S.C. §§1311, 1312, 1313, 1316, and 1317) and other appropriate provisions of Indiana law, including state water quality standards.**

**(4) “Applicant”, for purposes of an application for a water quality certification or a surface water modification permit, means:**

- (A) for a corporation, a responsible corporate officer;
  - (B) for a partnership or sole proprietorship, a general partner or the proprietor, respectively;
  - (C) for a municipality, state or federal agency, or other political subdivision, a principle executive officer or ranking elected official; or
  - (D) an individual.
- (5) “Channel” means the flowpath of a waterway, including streams, ditches, rivers, and other related water courses.
- (6) “Channelization” means the alteration of a natural stream channel, either by dredging, excavating or bank armoring, in order to straighten, deepen or otherwise alter the flowpath and velocity of water traveling within the channel.
- (7) “Clean Water Act” means the Federal Water Pollution Control Act (33 U.S.C. §1341).
- (8) “Commissioner” means the commissioner of the department of environmental management.
- (9) “Compensatory mitigation” means the restoration, creation, or rehabilitation of a wetland or other waters of the state to compensate for losses of designated and existing uses.
- (10) “Corps general permit” means a permit that:
  - (A) authorizes a category of discharges of dredged or fill material under the Clean Water Act where the categories of discharge:
    - (i) are similar in nature;
    - (ii) will cause only minimal adverse environmental effects when performed separately;
    - (iii) will have only minimal cumulative adverse effect on the environment; and
  - (B) is issued by the Corps of Engineers pursuant to 33 U.S.C. 1344(e).
- (11) “Corps individual permit” means a permit issued by the Corps of Engineers pursuant to 33 U.S.C. 1344(a).
- (12) “Corps of Engineers” means the United States Department of the Army, Corps of Engineers.
- (13) “Creation” means the the manipulation of a site for the purpose of turning the site, which was not previously a wetland, into a wetland.
- (14) “Cumulative impacts” means the effects on waters of the state that are attributable to the collective effect of discharges, secondary effects and other activities associated with other projects.
- (15) “Deep water” means areas that are permanently inundated at mean annual water depths greater than six and six-tenths (6.6) feet. These are areas that are not wetlands and may include lakes, rivers, ponds, and borrow pits.

- (16) **“Department”** means the department of environmental management.
- (17) **“Emergent wetland”** means a wetland that is characterized by erect, rooted, herbaceous hydrophytes, excluding mosses and lichens.
- (18) **“Enhancement”** means the conversion of one wetland type to another with a higher perceived value; it is considered to be an impact to a wetland’s existing and designated uses.
- (19) **“Farmed wetland”** means a wetland that prior to December 23, 1985, was manipulated and used to produce an agricultural commodity, and on December 23, 1985, did not support woody vegetation and is inundated for fifteen (15) consecutive days or more during the growing season or ten percent (10%) of the growing season, whichever is less, in most years (fifty (50) percent chance or more).
- (20) **“Final decision”** means a decision by the commissioner to issue, deny, modify, revoke, or waive a section 401 water quality certification **or surface water modification permit.**
- (21) **“Forested wetland”** means a wetland dominated by woody vegetation that has a diameter, at breast height, greater than three (3) inches, regardless of total height. Wetlands that have been cleared of woody vegetation within five (5) years previous to the project will be considered forested wetlands by the department.
- (22) **“Navigable waters”** means waters of the United States, including the territorial seas.
- (23) **“Open water”** means areas of a wetland that are permanently inundated at mean annual water depths less than or equal to six and six-tenths (6.6) feet. These areas may contain little or no vegetation.
- (24) **“Practicable”** means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of project purposes.
- (25) **“Preservation”** means the maintenance and protection of a wetland as a wetland in perpetuity via a deed restriction or a conservation easement to insure that designated and existing uses are protected from anthropogenic activities.
- (26) **“Rehabilitation”** means the remediation of factors causing degradation of existing and designated uses of a wetland.
- (27) **“Relocation”** means the alteration of the flow line of a waterway, including new alignments, tiling, piping, or other related practices.
- (28) **“Restoration”** means the manipulation of a site for the purpose of returning the site, which was previously a wetland, back into a wetland.
- (29) **“Scrub-shrub wetland”** means a wetland dominated by woody vegetation having a height greater than three and two-tenths (3.2) feet and a stem diameter less than three (3) inches. This includes true shrubs, young trees, and trees or shrubs stunted by environmental conditions.
- (30) **“Secondary impacts”** means impacts on waters of the state that are associated

with a discharge but do not result from the actual discharge.

(31) "Shaping or other alteration" means the manipulation of streambanks to make the channel wider or narrower or an alteration of the slopes of streambanks.

(32) "Tier I wetland" means a wetland classified as such according to 327 IAC 2-1.8-4.

(33) "Tier II wetland" means a wetland classified as such according to 327 IAC 2-1.8-4.

(34) "Water dependent" means a project that requires access to, proximity to, or siting within a water body in order to fulfill the basic purpose of the project.

(35) "Water quality certification" means a section 401 water quality certification issued by the department.

(36) "Waters of the United States" means those waters as defined in 33 CFR § 328.\*

(37) "Waters" or "waters of the state" has the meaning set forth in IC 13-11-2-265.

(38) "Watershed" means a geographic region within which water drains into a particular river, stream, or other body of water.

(39) "Wetland" means an area that is inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. For the purpose of this rule, wetlands will be determined and delineated using the U.S. Army Corps of Engineers Wetland Delineation Manual, Technical Report Y-87-1, January 1987\*\*.

\*33 CFR § 328 is incorporated by reference. Copies of this document may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Quality, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206. (Water Pollution Control Board; 327 IAC 2-1.8-2)

\*\*The Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1 is incorporated by reference. Copies of this manual may be obtained from the U.S. Army Engineer Waterways Experiment Station, 3909 Halls Ferry Road, Vicksburg, Mississippi 39180 or from the Indiana Department of Environmental Management, Office of Water Quality, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206.

(Water Pollution Control Board; 327 IAC 17-1-4)

## **Rule 2. Application and Notice**

### **327 IAC 17-2-1 Application requirements**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 1. (a) An application for a water quality certification or a surface water modification permit must be submitted to and approved by the commissioner in advance of commencement of the project and must:**

- (1) be on a form approved by the commissioner;**
- (2) be complete;**
- (3) be legible;**
- (4) contain the signed statement required by subsection (b);**
- (5) be signed by the applicant;**
- (6) include a wetland delineation performed in accordance with procedures established by the Corps of Engineers according to the Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1 (January 1987)\*, depicting all wetlands on the subject property;**
- (7) provide a list of names and addresses of adjacent property owners to the proposed project; and**
- (8) provide the alternatives analysis described by 327 IAC 17-3-4(b) and 327 IAC 17-3-5(b).**

**(b) An application required by subsection (a) must contain the following statement, signed by the applicant, “I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. The information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”.**

**(c) If the applicant is a corporation or otherwise not an individual, the application must contain the name of the individual who shall be primarily responsible for the project that is to be certified.**

**(d) If the department determines that more information is necessary, including a compensatory mitigation plan, in order to accomplish the review of the application, it shall promptly notify the applicant and request such information. The application is not considered complete until the applicant has submitted all information required or otherwise requested by the department under this section. The department shall notify an applicant once it determines an application is complete.**

(e) The department shall act upon a complete application within one hundred twenty (120) days of the applicant's receipt of notification under subsection (d). If the department fails to act within one hundred twenty (120) days, then the water quality certification or surface water modification permit shall be deemed waived.

(f) The applicant has the burden of proving that its project will comply with the applicable provisions of federal and state law.

\*The Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1 is incorporated by reference. Copies of this manual may be obtained from the U.S. Army Engineer Waterways Experiment Station, 3909 Halls Ferry Road, Vicksburg, Mississippi 39180 or from the Indiana Department of Environmental Management, Office of Water Quality, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206. (*Water Pollution Control Board; 327 IAC 17-2-1*)

327 IAC 17-2-2 Public notice of a water quality certification application and a surface water modification permit

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 2. (a) Except as provided in subsection (g), the commissioner shall provide public notice of and an opportunity to comment on applications submitted to the department for water quality certification and surface water modification permits.

(b) The public notice must contain the following information:

- (1) The applicable statutory and regulatory authority.
- (2) The name and address of the applicant and, if any, the applicant's agent.
- (3) The name, address, and telephone number of the department's employee who may be contacted concerning the application.
- (4) The location of the proposed project, including the fourteen (14) digit hydrologic code of the watershed in which the project is located.
- (5) A brief description of the proposed project, including the following:
  - (A) Its purpose and intended use.
  - (B) A description of any structures that are to be erected.
  - (C) The type, composition, and quantity of materials to be disposed of or discharged.
  - (D) Possible impacts to wetlands, streams, or other waters of the state.
  - (E) A description of any compensatory mitigation proposed by the applicant.
- (6) A statement telling where the public may view or obtain a copy of the plan and

elevation drawing, if reproducible, showing the general and specific site location.

(7) A statement that the comment period deadline is twenty-one (21) calendar days from the date of mailing of the public notice unless otherwise specified.

(8) A statement that any person may request in writing that a public hearing or meeting be held to consider the application.

(c) The department shall provide notice of an application to the following:

(1) The applicant.

(2) Adjacent property owners, as provided by the applicant under section 1(a)(7) of this rule.

(3) The following agencies:

(A) Department of natural resources.

(B) United States Environmental Protection Agency.

(C) United States Fish and Wildlife Service.

(D) Any state or federal agency responsible for issuing water quality certification, a surface water modification permit, or their equivalent, in any other state whose water quality may be adversely affected by a proposed project.

(E) Affected county and local plan commissions.

(4) Any person who requests copies of public notices of applications.

(d) The department shall consider comments received during the public comment period and may forward comments received, via certified mail, within five (5) working days after the close of the comment period, to the applicant for a response. The applicant shall provide the department with a written response to any comments forwarded by the department, within fourteen (14) days of receipt of the comments, with the following exceptions:

(1) If an applicant requires additional time to respond to comments, the applicant shall so inform the department in writing within the fourteen (14) day response time period.

(2) The department may place an application on hold for a time period agreed upon with the applicant requesting additional time.

If an applicant fails to provide a written response to comments received, the department may deny the application.

(e) The department shall issue a supplemental public notice of an application in the event of one (1) of the following:

(1) The department originally denied the application but the applicant has submitted a new or modified proposal.

(2) The applicant is proposing to significantly change a project for which the

department had previously provided public notice and the department received comments from the public on the project as originally proposed.

(3) A request for modification is made according to 327 IAC 17-5-2.

(f) If the applicant is proposing to significantly change a project for which the department had previously provided public notice, but the department received no public comment on the project, the department may issue a supplemental public notice.

(g) A joint public notice shall be issued by the department and the Corps of Engineers, utilizing the public notice procedures set forth in 33 CFR § 325.3, if an application for a water quality certification requires a corps individual permit. (*Water Pollution Control Board; 327 IAC 17-2-2*)

### **327 IAC 17-2-3 Procedures for notification to adjacent states**

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-2; IC 13-18-3-3

Affected: IC 13-18-3; IC 13-18-4

Sec. 3. (a) If the department determines that a proposed project may adversely affect the quality of the waters of another state, the department shall notify the following about the receipt of the application:

(1) The administrator.

(2) The certifying agency in a state whose water quality may be affected.

(b) In addition to rights granted to other states under section 401(a)(2) of the Clean Water Act, a state whose water quality may be affected shall be granted sixty (60) days after receipt of the notification provided according to subsection (a)(2), to provide comments and specify objections to the application.

(*Water Pollution Control Board; 327 IAC 17-2-3*)

### **327 IAC 17-2-4 Public hearing or meeting**

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 4. (a) A person may request in writing that a public hearing or meeting be held to consider issues related to water quality in connection with a specific application for water quality certification **or surface water modification permit**. The request must:

(1) state the reason for requesting the public hearing or meeting as specifically as possible;

(2) be submitted to the department during the public notice period; and

(3) be related to water quality issues.

(b) The department may hold a public hearing or public meeting if:

- (1) substantial questions about the project are raised during the comment period;
- (2) new information is obtained about water quality issues; or
- (3) significant interest is expressed in the project.

(c) The department shall publish, in a daily or weekly newspaper in general circulation throughout the area affected by the project, a public notice of a scheduled public hearing or meeting setting forth the date, time, and place. The department shall notify adjacent property owners specified under 327 IAC 17-2-1(a)(7) of the public hearing or meeting. The department shall locate the public hearing or meeting in the vicinity of the proposed project.

(d) The department shall encourage an applicant to attend a public hearing or meeting held concerning the applicant's proposed project.

(e) Any person may appear at a public hearing or meeting and present oral or written comments concerning the proposed project.

(f) The department shall consider comments received at the public hearing or meeting or submitted to the department within fourteen (14) days of the public meeting or hearing before a decision may be rendered on the application.

(g) A public hearing shall be recorded and a transcript prepared. A copy of the transcript must be available for purchase from the department or the transcriber of the public hearing and be available for public inspection during normal business hours at the department. A public meeting will not be recorded. (*Water Pollution Control Board; 327 IAC 17-2-4*)

### **Rule 3. Review of Application for Water Quality Certification and Surface Water Modification Permit**

#### **327 IAC 17-3-1 Assessment of wetland existing and designated uses**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 1. Uses set forth at 327 IAC 2-1.8-3 are presumed to exist in a wetland.** (*Water Pollution Control Board; 327 IAC 17-3-1*)

#### **327 IAC 17-3-2 Assessment of alternatives and impacts**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 2. (a)** An applicant shall consider all alternatives that would avoid impacts to a wetland or other waters of the state, regardless of the size, location, or type of project.

**(b)** The department shall:

**(1)** review a water quality certification or surface water modification permit application to determine if the proposed project is water dependent; and

**(2)** evaluate the alternatives for avoidance for each project and may require an applicant to consider additional options for avoiding impacts to the waters of the state.

*(Water Pollution Control Board; 327 IAC 17-3-2)*

**327 IAC 17-3-3 Water dependent projects impacting a Tier I wetland or other waters of the state**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 3. (a)** The following requirements apply to a water dependent project that will involve impacts to a Tier I wetland or other waters of the state:

**(1)** The applicant shall demonstrate that all reasonable and appropriate steps have been taken to minimize potential adverse impacts on wetlands or other waters of the state.

**(2)** The department shall consider the following factors to determine if potential impacts to the wetlands or other waters have been minimized to the greatest extent:

**(A)** Spatial requirements of the project.

**(B)** Location of existing structural or natural features that may dictate the placement or configuration of the project.

**(C)** The purpose of the project and how the purpose relates to placement, configuration, or density.

**(D)** The spatial distribution of wetlands or other waters on the site.

**(E)** Individual, secondary, and cumulative impacts.

**(F)** An applicant's efforts to:

**(i)** modify the size, scope, configuration, or density of the project;

**(ii)** accommodate the project to site constraints, including:

**(AA)** zoning;

**(BB)** infrastructure;

**(CC)** access; or

**(DD)** natural features; and

(iii) otherwise minimize impacts.

(b) If the department finds that an applicant has not complied with the requirements of subsection (a), the department shall deny the **permit** or certification for the proposed project.

(c) Any impact to a wetland or other waters remaining after the applicant has minimized impacts to the greatest extent possible shall be compensated for according to 327 IAC 17-4. (*Water Pollution Control Board; 327 IAC 17-3-3*)

**327 IAC 17-3-4 Nonwater dependent projects impacting a Tier I wetland or other waters of the state**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 4. (a)** The following requirements apply to a nonwater dependent project that will involve impacts to a Tier I wetland or other waters of the state:

(1) Practicable alternatives are presumed to exist unless the applicant demonstrates otherwise.

(2) The department shall not grant the **permit** or certification if there is a practicable alternative that would avoid or have less impact on a wetland or other waters of the state.

(b) An applicant shall analyze and consider all alternatives to the design of a proposed project that would avoid or have less adverse impacts to a wetland or other waters of the state. The alternatives analysis must include the following:

(1) A no-build alternative that would entirely avoid impacts to a wetland and other waters of the state.

(2) Alternative sites or locations in the region where the project could be conducted, including the location of the alternative site, the owner of the alternative site, and the cost of acquiring the property.

(3) Alternative project configurations or designs on the proposed project site.

(4) Specific information explaining why each alternative or alternative site or location was rejected.

Compensatory mitigation shall not be considered an alternative in the analysis conducted according to this subsection.

(c) The applicant shall submit the alternatives analysis to the department as a part of the application according to 327 IAC 17-2-1(a)(8).

**(d) The department may require an applicant to analyze additional alternatives.**

**(e) The department shall consider the following factors, in light of the purpose of the project, to determine whether practical alternatives to avoid impacts are available:**

- (1) The basic project purpose and whether it could be reasonably accomplished using one (1) or more other sites in the region that would avoid impacts to wetlands or other waters.**
- (2) The existence of sites not owned by the applicant in the area that could reasonably be obtained, used, expanded, or managed to fulfill the basic purpose of the proposed project.**
- (3) The general suitability of the alternate sites considered by the applicant.**
- (4) The ability to reasonably modify the size, scope, configuration, or density of the project to avoid impacts to a wetland or other waters.**
- (5) Efforts by the applicant, including requests for variances or planned unit developments, to accommodate constraints imposed on alternatives by zoning standards or infrastructure.**

**(f) If the department determines there are no practicable alternatives that would avoid or have less adverse impacts on a Tier I wetland or other waters of the state, then the applicant shall demonstrate that all reasonable and appropriate steps have been taken in the project design to minimize potential impacts on wetlands or other waters of the state before a water quality certification shall be issued. The department shall consider the following factors, in light of the purpose of the project, to determine if all reasonable and appropriate steps have been taken:**

- (1) Spatial requirements of the project.**
- (2) Location of existing structural or natural features that may dictate the placement or configuration of the project.**
- (3) How the purpose of the project relates to the placement, configuration, or density of elements of the project.**
- (4) The spatial distribution of wetlands or other waters on the site.**
- (5) Individual, secondary, and cumulative impacts.**
- (6) An applicant's efforts to:**
  - (A) modify the size, scope, configuration, or density of the project;**
  - (B) accommodate site constraints, including zoning, infrastructure, access, or natural features; and**
  - (C) otherwise minimize impacts.**

**(g) If the department finds that an applicant has not complied with:**

- (1) the alternatives analysis requirements of subsection (b); or**

(2) the minimization requirements of subsection (f);  
the department shall deny the **permit** or certification for the proposed project.

(h) Any impact to a wetland or other waters remaining after the applicant has minimized impacts to the greatest extent possible must be compensated for according to 327 IAC 17-4. (*Water Pollution Control Board; 327 IAC 17-3-4*)

**327 IAC 17-3-5 Impacts to Tier II wetlands**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 5. (a)** The following requirements apply to a project that will involve impacts to a Tier II wetland:

(1) Practicable alternatives are presumed to exist unless the applicant demonstrates otherwise.

(2) The department shall not grant the **permit** or certification if there is a practicable alternative to the proposed discharge that would avoid or would have less impact on a wetland or other waters of the state.

(b) An applicant shall analyze and consider all alternatives to the design of a proposed project that would avoid impacts to a wetland or other waters of the state. The alternatives analysis must include the following:

(1) A no-build alternative that would entirely avoid impacts to a wetland and other waters of the state.

(2) Alternative sites or locations in the region where the project could be conducted, including the location of the alternative site, the owner of the alternative site, and the cost of acquiring the property.

(3) Alternative project configurations or designs on the proposed project site.

(4) Specific information explaining why each alternative or alternative site or location was rejected.

Compensatory mitigation shall not be considered an alternative in the analysis conducted according to this subsection.

(c) The applicant shall submit the alternatives analysis to the department as a part of the application according to 327 IAC 17-2-1(a)(8).

(d) The department may require an applicant to analyze additional alternatives.

(e) The department shall consider the following factors, in light of the purpose of the

project, to determine whether practical alternatives to avoid impacts are available:

- (1) The basic project purpose and whether it could be reasonably accomplished using one (1) or more other sites in the region that would avoid wetland impacts.
- (2) The existence of sites not owned by the applicant in the area that could reasonably be obtained, used, expanded, or managed to fulfill the basic purpose of the proposed project.
- (3) The general suitability of the alternate sites considered by the applicant.
- (4) The ability to reasonably modify the size, scope, configuration, or density of the project to avoid impacts to a wetland.
- (5) Efforts by the applicant, including requests for variances or planned unit developments, to accommodate constraints imposed on alternatives by zoning standards or infrastructure.

(f) If the department determines there are no practicable alternatives that would avoid or have less adverse impacts on a Tier II wetland or other waters of the state, then the applicant shall demonstrate that all reasonable and appropriate steps have been taken in the project design to minimize potential impacts on a wetland or other waters of the state before a water quality certification shall be issued. The department shall consider the following factors, in light of the purpose of the project, to determine if all reasonable and appropriate steps have been taken:

- (1) Spatial requirements of the project.
- (2) Location of existing structural or natural features that may dictate the placement or configuration of the project.
- (3) How the purpose of the project relates to the placement, configuration, or density of elements of the project.
- (4) The spatial distribution of wetlands or other waters on the site.
- (5) Individual, secondary, and cumulative impacts.
- (6) An applicant's efforts to:
  - (A) modify the size, scope, configuration, or density of the project;
  - (B) accommodate site constraints including zoning, infrastructure, access, or natural features; and
  - (C) otherwise minimize impacts.

(g) If the department finds that an applicant has not complied with:

- (1) the alternatives analysis requirements of subsection(b); or
- (2) the minimization requirements of subsection (f);

the department shall deny the **permit** or certification for the proposed project.

(h) If the applicant has demonstrated that there is no practicable alternative and there

will still be impacts to a Tier II wetland, then the applicant shall prepare and submit to the department an antidegradation demonstration in accordance with 327 IAC 2-1.8-5. The applicant shall submit the demonstration within forty-five (45) days of receipt of notification from the department that the project will impact a Tier II wetland. Except as provided in subsection (i), the antidegradation demonstration must include the following:

(1) An evaluation of the baseline economic condition of the county where the project is proposed to be located, including the county's:

- (A) unemployment rate;
- (B) population;
- (C) average household income relative to state and national averages; and
- (D) the percentage of the population living below the poverty level.

(2) Information on the anticipated impacts attributable to the proposed project in the county where the project will be located, including:

- (A) the change in employment or avoidance of a reduction in employment;
- (B) the reduction in the local unemployment rate attributable to the proposed project;
- (C) the total, annual, new payroll of resident nonofficers for the new or increased employment and the average wages for the new nonofficer employees or, in lieu of this information, the applicant may provide other information that quantifies the extent of the economic benefit to be provided to the area;
- (D) the change in net tax revenues;
- (E) the change in production level, if applicable;
- (F) the change in efficiency, if applicable; and
- (G) the extent of correction of an environmental or public health problem.

(3) An identification of the potential environmental and public health impacts attributable to the proposed project, including the potential impact on the following:

- (A) The aquatic community.
- (B) Endangered or threatened species.
- (C) Characteristics of the wetland that are unique or rare within the locality or state.
- (D) Ground water recharge.
- (E) Drinking water supplies.
- (F) Recreation and aesthetics.
- (G) Scientific research.
- (H) Shoreline or stream bank erosion protection.
- (I) Natural or regional storm water detention or retention.

(i) An applicant may provide:

- (1) an explanation as to why information required by subsection (h) is not necessary or appropriate for inclusion in the antidegradation demonstration; and**
- (2) additional information that the applicant deems relevant to the demonstration.**

**(j) If the department determines an antidegradation demonstration is incomplete, the department shall notify the applicant and specify additional information that is necessary to make the demonstration complete. The applicant shall supply the information to the department within forty-five (45) days of the request. The department shall deny the application if the applicant fails to provide the additional information in the time required, unless the department grants additional time to respond for good cause.**

**(k) Upon receipt of a complete antidegradation demonstration, the department shall provide public notice, request comment, and, if requested, schedule and hold a public meeting on the demonstration.**

**(l) After the receipt of a complete antidegradation demonstration, the department shall specify in writing any additional relevant information that it deems necessary to make a determination on the demonstration. Failure of an applicant to submit any additional information requested by the department within forty-five (45) days of receipt of the department's request shall result in the denial of the application unless the department grants additional time to respond for good cause.**

**(m) The department shall approve an antidegradation demonstration only if it determines that the proposed project would support important social and economic development in the area and would not result in an unacceptable environmental impact.**

**(n) Any impact to a wetland or other waters remaining after the applicant has minimized impacts to the greatest extent possible must be compensated for according to 327 IAC 17-4. (*Water Pollution Control Board; 327 IAC 17-3-5*)**

**327 IAC 17-3-6 Impacts to wetlands designated as outstanding state resource waters and outstanding national resource waters**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 6. The department shall ensure that no degradation of a wetland designated as an outstanding state resource water (OSRW) or an outstanding national resource water (ONRW) will occur. Degradation to these waters is prohibited unless the following conditions are met:**

- (1) The impact will last less than twelve (12) months.**
- (2) The person intending to cause the impact first receives water quality certification or a surface water modification permit for the impact.**
- (3) The applicant minimizes and justifies the short term, temporary impact to the satisfaction of the commissioner.**
- (4) The applicant demonstrates to the commissioner that no practicable alternative exists to avoid the impact using the criteria set forth in section 5 of this rule.**
- (5) The applicant remediates any impacts if required by the water quality certification or surface water modification permit.**

*(Water Pollution Control Board; 327 IAC 17-3-6)*

**327 IAC 17-3-7 Water quality certification review of proposed Corps general permits and general permits for projects requiring a surface water modification permit**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 7. (a) When the Corps of Engineers proposes a new or modified general permit, the department shall determine if the permit will comply with this rule.**

**(b) If the department determines a proposed corps general permit may cause or contribute to significant impact to waters of the state, the department may:**

- (1) propose modifications or revisions to the corps general permit to prevent significant impact to waters of the state;**
- (2) condition a water quality certification issued for the corps general permit to prevent significant impact to waters of the state; or**
- (3) deny water quality certification for the proposed corps general permit.**

**(c) The department shall deny water quality certification for any corps proposed general permit that would authorize activities in the following waters:**

- (1) A Tier II wetland.**
- (2) An outstanding state resource water.**
- (3) An outstanding national resource water.**
- (4) Exceptional use waters**
- (5) Designated salmonid waters.**

**IDEM may issue a water quality certification for a proposed corps general permit provided the water quality certification contains conditions prohibiting the use of the corps general permit in the waters specified in subdivisions (1) through (5).**

**(d) The department shall provide public notice according to 327 IAC 17-2-2 when**

considering an application for water quality certification for a corps general permit.

(e) The department may issue surface water modification general permits for alterations to waters of the state subject to this rule when the department determines:

- (1) the activities are substantially similar in nature; and
- (2) the activities, when considered individually and cumulatively, will not result in an adverse impact to water quality of any affected waters.

(f) A general permit created under subsection (e):

- (1) may be for use on specific waters, specific watersheds, or be broadly applicable throughout the state; and
- (2) shall be effective for four (4) years after the date of a final decision on the permit and shall expire unless the department renews or modifies the general permit.

(g) When the department determines a general permit could be created under subsection (e), or when an existing general permit is set to expire, the department shall notify the public according to procedures set forth in 327 IAC 17-2-2.

(Water Pollution Control Board; 327 IAC 17-3-7)

#### **Rule 4. Compensatory Mitigation of Water Quality Impacts**

**327 IAC 17-4-1 Compensatory mitigation required for projects impacting a Tier I wetland**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-7; IC 13-23-13; IC 13-24-1; IC 13-25-5**

**Sec. 1. (a) The department shall require an applicant to provide compensatory mitigation for a project that has an impact affecting more than one-tenth (0.1) acre of wetland.**

**(b) Unless the department determines otherwise, an applicant shall replace adversely affected existing or designated uses of a wetland proposed to be impacted through compensatory mitigation. Compensatory mitigation required under this subsection must include a wetland of the same type and support the same designated and existing uses, as approved by the department according to the conditions of the water quality certification issued to the applicant.**

**(c) An applicant shall provide compensatory mitigation for a project that will impact one-tenth (0.1) acre or less of a Tier I wetland and will have a significant impact on water quality as determined by the department. The department shall consider the following factors to determine if there is a significant impact:**

- (1) Whether the project's purpose is to maintain, repair, or rehabilitate existing, structures. For purposes of this subdivision, "structures" does not include drains or other drainage structures defined or regulated by IC 36-9-27.
- (2) The secondary and cumulative impacts of the project.
- (3) The proximity and hydrologic connection of the wetland proposed to be impacted to other water bodies.
- (4) The duration of the activity associated with the project.
- (5) The plant species diversity and fish and wildlife habitat components of the wetland to be impacted.
- (6) Whether the project is being undertaken to control, abate, or correct an environmental problem or threat to the environment, including a response action pursuant to one (1) of the following:
  - (A) The Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601)\*.
  - (B) A corrective action pursuant to the Resource Conservation Recovery Act (42 U.S.C. 6901)\*\*.
  - (C) An underground storage tank corrective action under IC 13-23-13.
  - (D) A remediation of petroleum releases under IC 13-24-1.
  - (E) A voluntary remediation under IC 13-25-5.
  - (F) An abatement or correction of any polluted condition under IC 13-18-7.

\*42 U.S.C. § 9601 and \*\*42 U.S.C. § 6901 are incorporated by reference. Copies of these laws may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Quality, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206. (*Water Pollution Control Board; 327 IAC 17-4-1*)

**327 IAC 17-4-2 Compensatory mitigation required for projects impacting a Tier II wetland**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 2.** Before an impact may be allowed to occur to a Tier II wetland, an applicant shall do the following to the satisfaction of the department:

- (1) Fully complete compensatory mitigation that is demonstrated to be successful in having replaced the existing and designated uses and type of wetland that are intended to be impacted by the project.
- (2) Provide written notice to the department of the successful completion of the

**compensatory mitigation required according to subdivision (1).**  
(*Water Pollution Control Board; 327 IAC 17-4-2*)

**327 IAC 17-4-3 Compensatory mitigation required for an impact to other waters of the state**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-7; IC 13-23-13; IC 13-24-1; IC 13-25-5**

**Sec. 3. (a) If compensatory mitigation is required by the department for an impact to a water of the state that is not a wetland, then the compensatory mitigation must:**

- (1) be approved by the department; and**
- (2) replace the existing and designated uses of the adversely affected water in accordance with the conditions contained in the water quality certification issued to the applicant.**

**(b) The department shall require an applicant to provide compensatory mitigation for a project that the department determines will have a significant impact on water quality according to subsection (c).**

**(c) The department shall consider the following factors to determine if a project will have a significant impact on water quality:**

- (1) The project's requirement to maintain, repair, or rehabilitate existing structures. For purposes of this subdivision, "structures" does not include drains or other drainage structures defined or regulated by IC 36-9-27.**
- (2) The secondary and cumulative impacts of the project.**
- (3) The proximity and hydrologic connection of the water body proposed to be impacted to other water bodies.**
- (4) The duration of the activity associated with the project.**
- (5) The plant species diversity and fish and wildlife habitat components of the water to be impacted.**
- (6) Whether the project is being undertaken to control, abate, or correct an environmental problem or threat to the environment, including a response action pursuant to one (1) of the following:**
  - (A) The Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601)\*.**
  - (B) A corrective action pursuant to the Resource Conservation Recovery Act (42 U.S.C. 6901)\*\*.**
  - (C) An underground storage tank corrective action under IC 13-23-13.**
  - (D) A remediation of petroleum releases under IC 13-24-1.**

**(E) A voluntary remediation under IC 13-25-5.**

**(F) An abatement or correction of any polluted condition under IC 13-18-7.**

**(d) A project involving the relocation, realignment, or channelization of an existing stream is presumed to have a significant impact on water quality unless an applicant demonstrates otherwise.**

**\*42 U.S.C. 9601 and \*\*42 U.S.C. 6901 are incorporated by reference. Copies of these laws may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Quality, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206. (*Water Pollution Control Board; 327 IAC 17-4-3*)**

**327 IAC 17-4-4 Time for performing compensatory mitigation**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 4. Where compensatory mitigation is required as a condition of a water quality certification, the applicant must complete the required compensatory mitigation within one (1) year of the date of issuance of the water quality certification unless a written extension is granted by the department. (*Water Pollution Control Board; 327 IAC 17-4-4*)**

**327 IAC 17-4-5 Location of compensatory mitigation**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 5. (a) Compensatory mitigation of impacts to waters of the state must occur, if practicable, on the same site as the project and its associated impacts as determined by the department.**

**(b) The department may authorize off-site compensatory mitigation if it determines that on-site compensatory mitigation has a low probability of success. In all cases the compensatory mitigation site must be located as close as possible to the project and its associated impacts. One (1) of the following shall be met before off-site compensatory mitigation may be authorized:**

**(1) Off-site compensatory mitigation using a mitigation bank must occur in the mitigation bank's service area as stipulated in the mitigation bank's charter.**

**(2) Off-site compensatory mitigation not using a mitigation bank must, to the greatest**

extent possible, be located within the same fourteen (14) digit United States Geological Survey Hydrologic Unit Code (USGS HUC) as the impact site.

(c) If off-site compensatory mitigation for impacts to Tier I wetlands under subsection (b)(2) is not practicable, off-site compensatory mitigation for impacted Tier I wetlands must be located according to the following:

(1) If the impact is less than or equal to twenty-five hundredths (0.25) acre, compensatory mitigation shall be provided within the same USGS HUC eight (8) digit watershed as the project impact.

(2) If the impact is greater than twenty-five hundredths (0.25) acre:

(A) compensatory mitigation shall be provided within the same USGS HUC eleven (11) digit watershed as the project impact; or

(B) if a better compensatory mitigation option can be identified within the eight (8) digit watershed, then approval may be granted at the discretion of the department upon written request from the applicant.

(d) Compensatory mitigation for an impact to a Tier II wetland shall be provided, regardless of size, within the same USGS HUC fourteen (14) digit watershed as the project impact.

(e) The department shall deny a **permit** or certification for a proposed project if a compensatory mitigation site cannot be located in compliance with this section. (*Water Pollution Control Board; 327 IAC 17-4-5*)

#### **327 IAC 17-4-6 Protection of a compensatory mitigation site**

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4; IC 32-1-2; IC 32-5-2.6

**Sec. 6. (a) A compensatory mitigation site must be protected for at least fifty (50) years through one (1) of the following methods:**

(1) A conservation easement held by a third party committed to conservation and maintenance of the property as a wetland and the wetland's existing and designated uses.

(2) A deed restriction that legally binds the property owner to maintain the property as a wetland and the wetland's existing and designated uses.

(b) A properly recorded conservation easement or deed restriction required by subsection (a) must be submitted to the department within one year of the date of issuance of the water quality certification **or surface water modification permit**.

(c) The department may grant additional time to the applicant to comply with the terms of this section upon receipt of a written request for extension that provides valid reasons for the needed extension.

(d) After the department notifies an applicant that the applicant's compensatory mitigation site is successful, the recipient may transfer responsibility for maintenance of the compensatory mitigation site for the length of time specified in subsection (a) in accordance with the following:

(1) The recipient of the water quality certification or surface water modification permit shall notify the department no less than sixty (60) days in advance of the proposed transfer date.

(2) The recipient of the water quality certification or surface water modification permit shall submit to the department a written agreement between the recipient and the transferee. The agreement must contain:

(A) a specific date for transfer of responsibility;

(B) an acknowledgment that the water quality certification recipient is liable for violations or mitigation failures up to the date of transfer; and

(C) an acknowledgment that the transferee is responsible for maintaining the compensatory mitigation site as a wetland, the wetland's existing and designated uses for the length of time specified in subsection (a) and is liable for violations or mitigation failures from the date of transfer and into the future.

(D) a copy of the properly recorded conservation easement or deed restriction.

If the transfer is approved by the department, the department shall modify the water quality certification or surface water modification permit to reflect the transfer. (*Water Pollution Control Board; 327 IAC 17-4-6*)

### 327 IAC 17-4-7 Compensatory mitigation ratios

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 7. (a) Wetlands proposed to be impacted shall be compensated for according to Table 7(a):

Table 7(a) Compensatory Mitigation Ratios	
Type of Wetland Proposed to be Impacted	Compensatory Mitigation : Impacted Wetland Ratio

<b>Open Water/Emergent</b>	<b>2:1</b>
<b>Scrub/Shrub</b>	<b>3:1</b>
<b>Forested</b>	<b>4:1</b>
<b>Tier II Wetlands</b>	<b>1:1</b>
<b>Farmed Wetlands</b>	<b>1:1</b>

(b) A compensatory mitigation ratio required by Table 7(a) may be reduced by the department in accordance with the following:

(1) An applicant proposing to replace a wetland that the department determines is significantly degraded or adversely altered may have the compensatory mitigation ratio lowered by up to five-tenths (0.5), at the discretion of the department, where the applicant proposes to replace the wetland of the same type supporting more uses and greater diversity of vegetation. This subdivision does not apply to farmed wetlands and Tier II wetlands.

(2) If an applicant completes mitigation prior to initiation of an impact and the compensatory mitigation is demonstrated to the department to be successful in replicating the existing and designated uses and type of the wetland proposed to be impacted, then a ratio may be lowered to 1:1 for the affected wetland type. The applicant must coordinate with the department prior to initiating the compensatory mitigation in order to insure that the applicable provisions of 327 IAC 17-4 will be met. The department shall not issue a water quality certification or surface water modification permit for a proposed impact until the department has determined the up-front compensatory mitigation is successful.

(3) An applicant that proposes wetland preservation, wetland rehabilitation, or a combination of both may have the compensatory mitigation ratio lowered, at the discretion of the department, by up to one (1.0) for a wetland type for a Tier I wetland, if the following terms are met:

(A) A net loss of wetland acreage shall be prevented by providing wetland restoration, creation, or both that is equal to the acreage and type of wetland to be impacted.

(B) The area to be preserved or rehabilitated must, at a minimum, equal the acreage impacted, as determined by the department.

(C) The secondary and cumulative impacts resulting from the project are insignificant.

In no event shall a mitigation ratio be reduced below 1:1.

(Water Pollution Control Board; 327 IAC 17-4-7)

**327 IAC 17-4-8 Financial responsibility concerning compensatory mitigation**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 8. (a) An applicant shall guarantee the success of compensatory mitigation for a Tier I wetland or other waters by one (1) of the following means:**

**(1) Successful completion of the compensatory mitigation, with written confirmation of the successful completion received from the department, prior to the department's authorization of any impact to the wetland.**

**(2) Posting of a performance bond or an irrevocable letter of credit, prior to the issuance of the water quality certification or surface water modification permit, that covers the following:**

**(A) Costs of:**

**(i) constructing and monitoring; and**

**(ii) other costs associated with the successful completion of the compensatory mitigation wetland.**

**(B) Outstanding liens on the property.**

**This subdivision does not apply to an applicant that is an agency, as defined by IC 4-2-6-1(1), or a political subdivision, as defined by IC 4-2-6-1(12)**

**(3) Purchase of credits in a mitigation bank approved by the department, if authorized pursuant to 327 IAC 17-4-10. The applicant shall submit proof to the department that sufficient credits have been purchased.**

**(b) The department shall release an applicant from the financial assurance required by subsection (a)(2) when:**

**(1) the compensatory mitigation has achieved all success criteria required by section 15 of this rule for at least two (2) consecutive years; and**

**(2) the department has inspected the compensatory mitigation site, determined it to be successful, and provided the applicant with written confirmation of the success status.**

*(Water Pollution Control Board; 327 IAC 17-4-8)*

**327 IAC 17-4-9 Storm water control requirements**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 9. If an impact to a Tier I or Tier II wetland is authorized by the department, the following storm water control requirements shall be met by the applicant:**

- (1) Appropriate storm water control measures must be installed to ensure that the peak post-development rate of surface water run-off, based on a ten (10) year, twenty-four (24) hour storm, as defined by 327 IAC 15-7-2(1), from the impacted wetland does not exceed the peak pre-development rate of run-off, based on a ten (10) year, twenty-four (24) hour storm, as defined by 327 IAC 15-7-2(1), from the impacted wetland.**
- (2) Water quality improvement measures must be incorporated into the design of the storm water control measures to the maximum extent practicable and may include the following:**

- (A) Oil and grease skimmers.**
- (B) Vegetative buffer strips.**

*(Water Pollution Control Board; 327 IAC 17-4-9)*

**327 IAC 17-4-10 Compensatory wetland mitigation bank usage**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 10. The department shall allow utilization of a mitigation bank if the following provisions are met:**

- (1) The provisions of 327 IAC 17-4-7 have been followed.**
- (2) The mitigation bank has been approved by the department.**
- (3) The department approves the use of the mitigation bank for the applicant's required compensatory mitigation.**
- (4) The department determines that the compensatory mitigation produced at the bank will compensate for the existing and designated uses lost at the proposed wetland impact site.**
- (5) An impact being mitigated through the use of a mitigation bank must occur in the mitigation bank's service area as stipulated in the mitigation bank's charter.**

*(Water Pollution Control Board; 327 IAC 17-4-10)*

**327 IAC 17-4-11 Documentation required for wetland compensatory mitigation plan**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 11. (a) A wetland compensatory mitigation plan must be:**

- (1) submitted by the applicant if wetland compensatory mitigation is required by the department; and**
- (2) approved by the department prior to the issuance of a water quality certification or surface water modification permit.**

- (b) A wetland compensatory mitigation plan must, at a minimum, give details of the following:**
  - (1) Existing conditions at the wetland to be impacted, including the following:**
    - (A) Hydrology.**
    - (B) Type of vegetation, including native, exotic, and invasive species.**
    - (C) Current land use of the project site.**
    - (D) Surrounding land use.**
    - (E) Soils.**
    - (F) Topography.**
  - (2) Existing conditions at the proposed wetland mitigation site, including the following:**
    - (A) Hydrology.**
    - (B) Type of vegetation, including native, exotic, and invasive species.**
    - (C) Current land use of the project site.**
    - (D) Surrounding land use.**
    - (E) Soils.**
    - (F) Topography.**
  - (3) Acreage and type of wetlands proposed to be impacted.**
  - (4) Acreage and type of proposed wetland compensatory mitigation.**
  - (5) Description of compensatory mitigation goals and success criteria.**
  - (6) Description of compensatory mitigation methods.**
  - (7) Planting lists.**
  - (8) Narrative description of the following:**
    - (A) Planned hydrology, including the following:**
      - (i) Methods and data used to estimate the planned hydrology.**
      - (ii) Planned seasonal high water elevation and depth.**
      - (iii) Planned mean water elevation and depth.**
      - (iv) Planned duration of saturation or inundation, or both.**
    - (B) Planned vegetation communities developed by using “Classification of Wetlands and Deepwater Habitats of the United States”, U.S. Fish and Wildlife Service, Office of Biological Services, FWS/OBS-79/31, (December 1979)\*, to list the wetland community types to be constructed.**
  - (9) Drawings, plans, photographs, and maps depicting the planned postconstruction grades, water levels, and plant communities of the compensatory mitigation, including the following:**
    - (A) Detailed topographic drawings.**
    - (B) Cross sectional drawings, depicted in National Geodetic Vertical Datum, including the following:**
      - (i) Planned grade elevation.**
      - (ii) Water control elevation.**

(iii) Planned mean water elevation.

(iv) Planned seasonal high water elevation.

(C) Planting plan related directly to water depths.

(D) Aerial photographs of the proposed impact site prior to construction.

(E) Aerial photographs of the proposed compensatory mitigation site prior to construction.

(F) Map depicting the location of the proposed mitigation site relative to new construction or other existing landmarks.

(G) Longitude and latitude of the center of each proposed compensatory mitigation site.

(c) The applicant shall submit a baseline report summarizing the following:

(1) Conditions existing at the site prior to construction of the proposed project and compensatory mitigation.

(2) The construction process.

(3) Design features to be implemented to restore the aquatic habitat.

(d) The department may request additional information from the applicant if it is determined to be necessary.

**\*This document is incorporated by reference. Notwithstanding language to the contrary in the primarily incorporated documents, the versions of all secondarily incorporated documents, which are those documents referred to in the primarily incorporated documents, shall be the versions in effect on the date of final adoption of this rule. Copies of this publication may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Quality, Indiana Government Center-North, 100 North Senate Avenue, Room 1255, Indianapolis, Indiana 46206. (*Water Pollution Control Board; 327 IAC 17-4-11*)**

#### **327 IAC 17-4-12 Review of wetland mitigation plans**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 12. A complete compensatory mitigation plan shall be reviewed by the department and approved only if the department determines the following:**

**(1) The existing and designated uses lost by impacting an existing wetland will be replaced by compensatory mitigation that will provide uses equal or superior to the lost uses.**

**(2) There is an overall probability of success of the compensatory mitigation, taking into consideration the following factors:**

- (A) The methods to be used to restore or create wetlands on a proposed compensatory mitigation site.**
- (B) The side slopes or other slopes affecting water levels on a proposed compensatory mitigation site.**
- (C) The proximity of a proposed compensatory mitigation site to other waters or natural areas.**
- (D) The presence of exotic plant species on or adjacent to a proposed compensatory mitigation site.**
- (E) The inclusion of a upland buffer zone around a proposed compensatory mitigation site.**
- (F) The methods proposed to control hydrology on a proposed compensatory mitigation site.**
- (G) The land use adjacent to a proposed compensatory mitigation site.**
- (H) The methods proposed to establish vegetation on a proposed compensatory mitigation site.**
- (I) The proposed plan for long term management of a proposed compensatory mitigation site.**
- (J) The uses to be replaced.**
- (K) The success criteria to be met, as specified in section 15 of this rule.**

*(Water Pollution Control Board; 327 IAC 17-4-12)*

**327 IAC 17-4-13 Compensatory wetland mitigation monitoring**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-14-1-13; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 13. (a) A wetland compensatory mitigation monitoring plan must be approved by the department prior to the commencement of compensatory mitigation activities.**

**(b) A compensatory mitigation site shall be monitored until the department provides the applicant with a letter confirming that the success criteria stipulated in the water quality certification or surface water modification permit and in section 15 of this rule have been achieved for at least two (2) consecutive years.**

**(c) Vegetation monitoring must occur:**

- (1) between June 1 and November 1 unless the applicant provides compelling scientific evidence that the wetland type proposed requires earlier monitoring; and**
- (2) annually within thirty (30) days of the anniversary date of the first monitoring**

**event.**

**(d) The monitoring period to determine achievement of the success criteria for at least two (2) consecutive years shall start over if monitoring occurs other than as required by subsection (c).**

**(e) An applicant is responsible for the monitoring necessary to determine when a compensatory mitigation site has achieved the success criteria. A monitoring plan must, at a minimum, provide the following:**

- (1) Description of the compensatory mitigation success criteria.**
- (2) Goals that must be met to achieve the criteria.**
- (3) Methods for evaluating the success of compensatory mitigation.**
- (4) Map of sample points.**
- (5) Monitoring schedule.**
- (6) Specific factors to be monitored, that may include the following:**
  - (A) Vegetation sampling.**
  - (B) Exotic species surveys.**
  - (C) Growth rates for trees and shrubs.**
  - (D) Planted species survival rates.**
  - (E) Macroinvertebrate sampling.**
  - (F) Amphibian sampling.**
  - (G) Wildlife surveys.**
  - (H) Ground water and hydrology monitoring.**
  - (I) Soils sampling.**
  - (J) Water quality sampling.**
  - (K) Delineation of the jurisdictional extent of wetlands on the site.**
  - (L) As built survey of boundaries, elevations of structures, and topography.**

**(f) If monitoring reports or inspection of the compensatory mitigation site reveals the presence of exotic plant species in excess of the limits listed in section 15 of this rule, the department shall extend the monitoring period required by subsection (b) to monitor the effectiveness of control measures and gauge the rate of infestation.**

**(g) The department may release an applicant from an extended monitoring period required by subsection (f) if one (1) of the following occurs:**

- (1) The site complies with section 15 of this rule.**
- (2) Sufficient funding is provided in a long term management trust to control the exotic plant species.**

*(Water Pollution Control Board; 327 IAC 17-4-13)*

**327 IAC 17-4-14 Documentation required for a wetland monitoring report**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-14-1-13; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 14.** An applicant shall submit wetland monitoring reports to the department as required by the water quality certification. A monitoring report must, at a minimum, provide the following:

- (1) Water quality certification or surface water modification permit identification number.
- (2) Corps of Engineer identification number, if applicable.
- (3) Project description.
- (4) Reprint of the monitoring plan.
- (5) Results of monitoring.
- (6) Report on the progress of the compensatory mitigation.
- (7) Photographic documentation.
- (8) Graphics depicting the development of plant communities and water levels that illustrate the progress of the compensatory mitigation over the monitoring period relative to the success criteria.
- (9) A postconstruction report that establishes baseline conditions at the compensatory mitigation site, including a summary of changes in hydrology and details of:
  - (A) final contours;
  - (B) wetland plantings; and
  - (C) seedings.

(Water Pollution Control Board; 327 IAC 17-4-14)

**327 IAC 17-4-15 Success criteria for a wetland compensatory mitigation site**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 15.** A wetland compensatory mitigation site must meet the following minimum success criteria:

- (1) Wetland areas of a compensatory mitigation site must meet the wetland jurisdictional requirements of the Corps of Engineers.
- (2) The wetland plant communities are free of the following exotic species:
  - (A) Purple loosestrife (*Lythrum salicaria*).
  - (B) Common reed (*Phragmites australis*).
  - (C) Eurasian water milfoil (*Myriophyllum spicatum*).
- (3) The combined surface area coverage of reed canary grass (*Phalaris arundinacea*) and cattail (*Typha spp.*), shall not cover more than fifteen percent (15%) of a

community type, unless the applicant provides documentation in the mitigation plan that the natural wetlands the compensatory mitigation site is attempting to recreate have a larger cattail (*Typha spp.*) component or the impacted wetlands contained larger areas of cattail (*Typha spp.*).

(4) No more than ten percent (10%) surface area coverage of the compensatory mitigation site may be:

- (A) open water;
- (B) bare ground; or
- (C) a combination of clauses (A) and (B);

unless the applicant provides documentation in the mitigation plan that the natural wetlands the compensatory mitigation site is attempting to recreate have a larger open water or bare ground component or the impacted wetlands contained larger areas of open water or bare ground.

(5) Native vegetation, excluding reed canary grass (*Phalaris arundinacea*) and cattail (*Typha spp.*), covers at least seventy percent (70%) of the compensatory mitigation site.

(6) The existing and designated uses lost at the impacted wetland are replaced.

(7) The success criteria set forth in the approved compensatory mitigation plan must be met.

(Water Pollution Control Board; 327 IAC 17-4-15)

### **327 IAC 17-4-16 Compensatory mitigation remediation for wetlands**

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

**Sec. 16. (a) An applicant shall submit a compensatory mitigation remediation plan for wetlands to the department for approval within sixty (60) days of one (1) of the following:**

**(1) Inability of the compensatory mitigation site to achieve:**

- (A) the planned hydrology within two (2) growing seasons after completion of construction of the compensatory mitigation;
- (B) the success criteria at least once within five (5) years of the completion of construction of the compensatory mitigation; or
- (C) the success criteria for two (2) consecutive years within the first seven (7) years of monitoring.

**(2) Indication, from at least two (2) consecutive years of monitoring, that the compensatory mitigation site is not likely to achieve the success criteria required by section 15 of this rule.**

**(b) A remediation plan must include the following:**

- (1) Identification of the problems preventing the compensatory mitigation site from achieving the success criteria.**
- (2) A course of action to eliminate the problems that may include one (1) or more of the following:**
  - (A) Selection of an alternative compensatory mitigation site that is more suitable for the compensatory mitigation required.**
  - (B) Replanting the compensatory mitigation site.**
  - (C) Regrading the compensatory mitigation site.**
  - (D) Construction of an upland buffer around the site.**
  - (E) Herbicide treatment of exotic invasive vegetation and native, nuisance species.**

**(c) The applicant shall initiate implementation of the remediation plan within one (1) calendar year of its approval by the department. (*Water Pollution Control Board; 327 IAC 17-4-16*)**

**327 IAC 17-4-17 Documentation required for a compensatory mitigation plan for waters other than wetlands**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 17. (a) A compensatory mitigation plan for waters other than wetlands must be:**

- (1) submitted by the applicant if required by the department; and**
- (2) approved by the department prior to the issuance of a water quality certification.**

**(b) A compensatory mitigation plan for waters other than wetlands must provide the following, where applicable:**

- (1) An assessment of the stream fisheries, water chemistry, flow regime, and riparian communities proposed to be impacted within the project area.**
- (2) An assessment of the in-stream or deep water habitat requirements of fish species that are noted in the stream assessment required under subdivision (1). The assessment must include an analysis, by species, of the aspects of stream structure that support the following:**
  - (A) Foraging.**
  - (B) Breeding.**
  - (C) Nursery.**
  - (D) Refuge areas.**
- (3) Details for the replacement or rehabilitation of in-stream or deep water habitat types, which may include the following:**

**(A) Specifications for:**

- (i) pools;**
- (ii) riffles;**
- (iii) in-channel or stream bank habitat structures;**
- (iv) riparian zone plantings or revegetation;**
- (v) creation of channel meanders;**
- (vi) restoration or rehabilitation of adjacent wetlands;**
- (vii) restoration or rehabilitation of deep water habitats; or**
- (viii) buffer areas.**

**(B) Construction plans with depictions of the locations of the mitigative measures specified under clause (A).**

**(C) An explanation of the construction plans required by clause (B), including:**

- (i) the predicted success of the compensatory mitigation; and**
- (ii) detailed contingency plans if the mitigation proposed under item (i) fails.**

**(D) A construction time schedule specifying the sequence of the construction of the following:**

- (i) The project.**
- (ii) The compensatory mitigation.**

**(4) The location of sampling points. The UTM coordinates of the sampling points shall be denoted on plan overview sheets and on aerial photos.**

**(5) A description of the compensatory mitigation success criteria described in section 22 of this rule.**

**(c) An applicant shall submit a baseline report summarizing the following:**

- (1) Conditions existing at the site prior to construction of the proposed project and compensatory mitigation.**
- (2) The construction process.**

**(d) The department may request additional information from the applicant if the department determines it is necessary. (*Water Pollution Control Board; 327 IAC 17-4-17*)**

**327 IAC 17-4-18 Review of mitigation plans for waters other than wetlands**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 18. The department shall review a complete compensatory mitigation plan for waters other than wetlands and shall approve it only if the following conditions are met:**

- (1) The existing and designated uses lost by impacting waters other than wetlands will**

be adequately replaced by the compensatory mitigation.

(2) There is an overall probability of success of the compensatory mitigation taking into consideration the following factors:

- (A) The methods to be used to recreate waters other than wetlands at a proposed compensatory mitigation site.
- (B) The construction methods to be used to recreate or stabilize stream banks.
- (C) The proximity of a proposed compensatory mitigation site to other waters or natural areas.
- (D) The presence of exotic plant species on a proposed compensatory mitigation site.
- (E) The inclusion of a buffer zone around a proposed compensatory mitigation site.
- (F) The methods proposed to control water flow through a proposed compensatory mitigation site.
- (G) The land use adjacent to a proposed compensatory mitigation site.
- (H) The methods proposed to establish vegetation on a proposed compensatory mitigation site.
- (I) The proposed plan for long term management of a proposed compensatory mitigation site.
- (J) The uses to be replaced.
- (K) The success criteria to be met.

*(Water Pollution Control Board; 327 IAC 17-4-18)*

**327 IAC 17-4-19 Documentation required for a compensatory mitigation monitoring plan for waters other than wetlands**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-14-1-13; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 19. (a)** A compensatory mitigation monitoring plan for waters other than wetlands must be approved by the department prior to the issuance of a water quality certification or surface water modification permit.

- (b)** A monitoring plan must, at a minimum, provide the following:
  - (1)** Description of the compensatory mitigation success criteria.
  - (2)** Goals that must be achieved to meet the success criteria.
  - (3)** Methods for evaluating the success of compensatory mitigation.
  - (4)** Map of sampling points.
  - (5)** Monitoring schedule.
  - (6)** Description of tests and sampling methods required to monitor the development

**and overall success of the mitigation.**

*(Water Pollution Control Board; 327 IAC 17-4-19)*

**327 IAC 17-4-20 Documentation required for a monitoring report for waters other than wetlands**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-14-1-13; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 20. (a)** An applicant must submit monitoring reports for waters other than wetlands to the department as required by conditions specified in the water quality certification **or surface water modification permit**. A monitoring report must, at a minimum, provide the following:

(1) A survey of the grade, shape, and capacity of mitigation to verify that these criteria match the criteria in the mitigation plan approved by the department.

(2) Results obtained using approved sampling protocols beginning at the time the mitigation construction is completed and water is released into the mitigation site, including the results of any required annual fisheries sampling that shall be conducted:

(A) in July of the year after the release of water into relocated channels; and

(B) from points established through discussions between the applicant and the department.

(b) Reports submitted to the department must include the following:

(1) Summary and raw data sheets.

(2) A narrative overview of the results of the surveys.

(3) A comparison of the results to the success criteria in section 22 of this rule.

(c) The department will evaluate results of testing and monitoring annually to compare the project to the success criteria and determine if additional action or monitoring is warranted.

(d) The department may require the applicant to prepare an annual report of habitat structures and features placed within the water body to assess:

(1) their condition or structural failure within the channels;

(2) the accumulation of sediment or debris; and

(3) other maintenance issues.

*(Water Pollution Control Board; 327 IAC 17-4-20)*

**327 IAC 17-4-21 Compensatory mitigation monitoring for waters other than wetlands**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-14-1-13; IC 13-18-3-1; IC 13-18-3-2

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 21. (a) A compensatory mitigation monitoring plan for waters other than wetlands must be approved by the department prior to the issuance of a water quality certification or surface water modification permit.**

**(b) A compensatory mitigation site shall be monitored until the department provides the applicant with a letter confirming that the success criteria stipulated in the water quality certification and in section 22 of this rule have been achieved for at least two (2) consecutive years.**

**(c) The applicant is responsible for monitoring factors necessary to determine when a compensatory mitigation site has achieved the success criteria required. These factors may include the following:**

- (1) Vegetation sampling.**
- (2) Fish surveys.**
- (3) Macroinvertebrate surveys.**
- (4) Water quality sampling.**
- (5) Postconstruction surveys of boundaries of the project site and site elevations.**
- (6) An evaluation of whether habitat and in-stream structures are functioning as designed.**
- (7) An assessment of the stability of stream banks and channel bottoms.**

*(Water Pollution Control Board; 327 IAC 17-4-21)*

**327 IAC 17-4-22 Success criteria for a compensatory mitigation site for waters other than wetlands**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 22. (a) The department shall require a compensatory mitigation site for waters other than wetlands to meet the following minimum success criteria:**

- (1) A reconstructed or relocated channel must:**
  - (A) support a community of fish species equal to or greater in diversity than the original channel; and**
  - (B) be comparable to the grade, hydraulic capacity, and basic channel geometry of the channel as specified in the water quality certification.**
- (2) A stream bank must:**
  - (A) be stable; and**
  - (B) require no additional structural improvements or corrections to maintain**

**stream structure or bank stability.**

**(b) The existing and designated uses lost from an impacted water body must be replaced.**

**(c) The success criteria set forth in the approved compensatory mitigation plan must be met.**

*(Water Pollution Control Board; 327 IAC 17-4-22)*

**327 IAC 17-4-23 Compensatory mitigation remediation for waters other than wetlands**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 13-18-3; IC 13-18-4**

**Affected: IC**

**Sec. 23. (a) An applicant shall submit a compensatory mitigation remediation plan for waters other than wetlands to the department for approval within sixty (60) days of one (1) of the following:**

**(1) Evidence of the following at the compensatory mitigation site:**

**(A) A structural failure.**

**(B) Damage from storm events.**

**(C) A downward trend in fishery communities that is the result of a failed habitat structure within the compensatory mitigation channel.**

**(D) Die off among plants or other vegetation features.**

**(2) Indication from at least two (2) consecutive years of monitoring that the site is not likely to achieve the success criteria required by section 22 of this rule.**

**(b) A remediation plan must include the following:**

**(1) Identification of the problems preventing the compensatory mitigation site from achieving the success criteria.**

**(2) A course of action to eliminate the problems that may include one (1) or more of the following:**

**(A) Addition of structures designed to enhance habitat or stabilize stream banks.**

**(B) Replanting the compensatory mitigation site.**

**(C) Reconstruction of the mitigation site.**

**(c) The applicant shall initiate implementation of the remediation plan within one (1) calendar year of its approval by the department. *(Water Pollution Control Board; 327 IAC 17-4-23)***

**Rule 5. Issuance, Denial, Revocation, Modification, or Expiration of a Water Quality Certification or Surface Water Modification Permit**

**327 IAC 17-5-1 Departmental action regarding a water quality certification or surface water modification permit**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 1. (a) The department shall issue one (1) of the following decisions concerning an application for a water quality certification or surface water modification permit:**

**(1) The department may grant a water quality certification or surface water modification permit for a proposed impact to a Tier I wetland or waters other than wetlands if:**

- (A) no other practicable alternative exists;**
- (B) the project complies with all applicable federal and state laws;**
- (C) impacts have been minimized in accordance with 327 IAC 17-3-4 (f); and**
- (D) the applicant provides compensatory mitigation in accordance with 327 IAC 17-4.**

**(2) The department may grant a water quality certification or surface water modification permit for a proposed impact to a Tier II wetland if:**

- (A) no other practicable alternative exists;**
- (B) the project complies with all applicable federal and state laws;**
- (C) the department approves the applicant's antidegradation demonstration; and**
- (D) the applicant provides compensatory mitigation that is completed and determined by the department to be successful in replacing all adversely impacted wetland existing and designated uses.**

**(3) The department may grant certification or a surface water modification permit for a project involving an impact to an outstanding state resource water or outstanding national resource water if:**

- (A) no other practicable alternative exists;**
- (B) the project complies with all applicable federal and state laws;**
- (C) impacts have been minimized in accordance with 327 IAC 17-3-6; and**
- (D) the impact is short term and temporary, generally less than one (1) year in duration.**

**(4) The department shall deny certification or a surface water modification permit if it is determined that:**

- (A) the requirements of subdivision (1), (2), or (3) are not met;**
- (B) significant degradation of water quality, including secondary and cumulative**

impacts, may result from the project;

(C) the proposed compensatory mitigation will not successfully replace the impacted existing and designated uses of the wetland;

(D) the project will cause significant degradation to water quality that cannot be offset with compensatory mitigation, even if alternatives are not available; or

(E) the applicant has failed to submit a complete application or has failed to provide additional information requested by the department.

(5) The department shall waive a water quality certification **or surface water modification permit** if the department fails to make a final determination within one (1) year of its receipt of a complete application unless the federal permitting agency chooses to accept a certification subsequent to the expiration of one (1) year.

(b) If the department grants a water quality certification **or surface water modification permit**, the department shall include in the certification **or permit** conditions and monitoring requirements the department deems necessary to ensure that the applicant complies with the applicable provisions of federal and state laws. (*Water Pollution Control Board; 327 IAC 17-5-1*)

### **327 IAC 17-5-2 Revocation or modification of a water quality certification or surface water modification permit**

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-14-1-13; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 2. (a) The department may revoke a water quality certification **or surface water modification permit** if one (1) of the following occurs:

(1) The applicant does not comply with one (1) or more conditions of the water quality certification **or surface water modification permit**.

(2) The applicant has caused or is likely to cause a violation of a state water quality standard or other applicable statutory or regulatory requirement.

(3) The applicant is in violation of one (1) of the following:

(A) Construction of compensatory mitigation measures according to the water quality certification **or surface water modification permit**.

(B) Construction of the project according to plans or specifications reviewed by the department.

(4) The applicant has misrepresented or failed to disclose fully all relevant facts in the application or during the application process.

(5) The applicant has failed to submit a monitoring report, post-construction report, or other document as required by 327 IAC 17-4.

(b) The department may modify a water quality certification or surface water modification permit if the department:

- (1) receives a request from the holder of a valid water quality certification or surface water modification permit, to modify a project or its associated impacts; or
- (2) determines that modification is necessary to ensure compliance with applicable provisions of federal or state law that have changed since issuance of the certification or permit, including changes in:
  - (A) construction or operation of the project;
  - (B) characteristics of the receiving water;
  - (C) the applicable water quality criteria; or
  - (D) applicable effluent limitations or other requirements of state law.

(c) The department shall process an application for modification as if it were an original application if the department determines the proposed project modifications will result in additional discharges or secondary impacts. (*Water Pollution Control Board; 327 IAC 17-5-2*)

**327 IAC 17-5-3 Expiration of a water quality certification or surface water modification permit**

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

Affected: IC 13-18-3; IC 13-18-4

Sec. 3. (a) A water quality certification or surface water modification permit granted or waived by the department will expire two (2) years after its issuance date if work is not commenced within wetlands or other waters. The department may extend the expiration date if:

- (1) the applicant requests an extension prior to the original expiration date; and
- (2) the department determines there has not been a change in the circumstances related to the water body or project as originally proposed.

(b) A water quality certification granted by the department for a corps general permit:

- (1) is effective for the duration of the corps general permit; and
- (2) must be modified or revoked if the department determines the corps general permit is causing or contributing to significant impacts to water quality.

(*Water Pollution Control Board; 327 IAC 17-5-3*)

**327 IAC 17-5-4 Emergency issuance of a water quality certification or surface water modification permit**

Authority: IC 4-21.5-4-1; IC 4-21.5-4-2; IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected: IC 13-18-3; IC 13-18-4**

**Sec. 4. The commissioner:**

**(1) may issue an emergency water quality certification or surface water modification permit if:**

**(A) an unacceptable and immediate threat to human life, water quality, or waters of the state, including wetlands, may occur; or**

**(B) a severe loss of property may result;**

**before a water quality certification or surface water modification permit could be issued in accordance with normal procedures according to this article;**

**(2) shall issue a public notice, no later than ten (10) days after the issuance of an emergency water quality certification or surface water modification permit, which:**

**(A) states the reasons for the emergency issuance; and**

**(B) complies with the requirements of 327 IAC 17-2-2; and**

**(3) shall incorporate, into an emergency water quality certification or surface water modification permit, all standards and criteria that would normally be applied to a project not being reviewed under the emergency provision of this section.**

*(Water Pollution Control Board; 327 IAC 17-5-4)*

**Rule 6. Notice and Appeal of Final Decision**

**327 IAC 17-6-1 Notice of final decision**

**Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2**

**Affected: IC 4-21.5**

**Sec. 1. (a) The department shall serve notice of its final decision by certified mail on the applicant and the following persons:**

**(1) Those who submitted comments during the comment period.**

**(2) Those who requested notice of the final decision.**

**(b) A final decision regarding a water quality certification or surface water modification permit issued by the department may be appealed in accordance with IC 4-21.5. A notice of final decision must include reference to the procedures available to appeal a final decision by requesting an adjudicatory hearing.**

**(c) A final decision becomes effective fifteen (15) days after service of the mailing is made, unless a petition for review and a petition for stay are filed according to IC 4-21.5-3-5 with the office of environmental adjudication within that fifteen (15) day period. *(Water Pollution Control Board; 327 IAC 17-6-1)***

**Rule 7. Conditions Applicable to a Water Quality Certification or Surface Water Modification Permit**

**27 IAC 17-7-1 Responsibilities**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 1. (a)** An applicant must comply with the conditions of the water quality certification **or surface water modification permit** issued in response to the application.

**(b)** Issuance of a water quality certification **or surface water modification permit** does not:

- (1)** relieve the applicant of its duty to comply with federal and state laws or obtain other permits or authorizations required to conduct the project;
- (2)** authorize injury to persons or private property or invasion of other private rights;
- (3)** authorize impacts or activities not detailed in the application; or
- (4)** convey property rights or exclusive privileges.

*(Water Pollution Control Board; 327 IAC 17-7-1)*

**327 IAC 17-7-2 Right of entry**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-14-2-2; IC 13-18-3-1; IC 13-18-3-2; IC 13-18-3-9

**Affected:** IC 13-18-3; IC 13-18-4

**Sec. 2. (a)** The department or its authorized representative, upon presentation of proper credentials, shall have the following rights:

- (1)** A right of entry to, upon, or through any premises, public or private:
  - (A)** that are the subject of the application, including property that is the site of the proposed compensatory mitigation;
  - (B)** where records, reports, monitoring or treatment equipment or methods, samples, or other data, required to be provided or maintained, are located; and
  - (C)** that contain a possible violation.
- (2)** Access to and right to copy any record that is required to be kept or submitted under the terms of the certification or **permit**.
- (3)** Access to inspect monitoring, treatment, or operational equipment or facility.
- (4)** Access to take samples.

**(b)** The department may authorize an employee of the department or other person under contract with the department to act as its representative. *(Water Pollution Control*

Board; 327 IAC 17-7-2)

**327 IAC 17-7-3 Compliance and abatement orders**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-18-3-1; IC 13-18-3-2; IC 13-18-3-9, IC 13-18-4-6

**Affected:** IC 13-30

**Sec. 3. (a)** The department may conduct an inspection to determine compliance with a water quality certification, a surface water modification permit, or applicable provisions of federal and state laws.

**(b)** If the department determines that a person is violating or is about to violate a provision of 327 IAC 2 or a condition of a water quality certification or surface water modification permit, the department shall serve notice on the person, by certified mail, of the department's determination. The notice shall include an order against the person to immediately cease the violation and complete one (1) of the following actions:

**(1)** Rectify the violation by restoring the water body to its pre-violation condition.

**(2)** Submit an application to the department for a water quality certification or surface water modification permit for the unauthorized activity.

*(Water Pollution Control Board; 327 IAC 17-7-3)*

**327 IAC 17-7-4 Enforcement**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-14-1-12; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-30

**Sec. 4.** A violation of this article may subject a person causing or contributing to the violation to administrative or judicial enforcement proceedings and the penalties provided pursuant to IC 13-30. *(Water Pollution Control Board; 327 IAC 17-7-4)*

**327 IAC 17-7-5 Prior unauthorized impacts**

**Authority:** IC 13-13-5-1; IC 13-13-5-2; IC 13-14-1-12; IC 13-18-3-1; IC 13-18-3-2

**Affected:** IC 13-30

**Sec. 5.** For waters that have been impacted without prior authorization from the department, the department shall:

**(1)** require partial or full restoration of the impacted waters;

**(2)** increase the compensatory mitigation ratios in 7(a);

**(3)** deny water quality certification or a surface water modification permit for the after-the-fact application; or

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*Revised from 1/24/2001 draft*

**(4) require any combination of the above.**  
*(Water Pollution Control Board; 327 IAC 17-7-5)*